

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

David Bernard Clark,
Petitioner,

vs.

Paul O'Connell, et al.,
Respondents.

CV 13-0129-TUC-JAS (JR)

**REPORT AND
RECOMMENDATION**

Pending before the Court is David Bernard Clark's Amended Petition for Writ of Habeas Corpus (Doc. 8) filed pursuant to 28 U.S.C. § 2254. In accordance with the Rules of Practice of the United States District Court for the District of Arizona and 28 U.S.C. § 636(b)(1), this matter was referred to the Magistrate Judge for report and recommendation. As explained below, the Magistrate Judge recommends that the District Court, after an independent review of the record, dismiss the Petition with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

In its Memorandum Decision affirming Clark's conviction and sentence, the Arizona Court of Appeals summarized the factual background as follows:¹

Pursuant to a plea agreement, Clark was convicted of failing to register as a sex offender as required by A.R.S. § 13-3821. The trial court imposed an enhanced, "somewhat mitigated," 3.5-year term of imprisonment. Thereafter, Clark initiated proceedings pursuant to Rule 32, arguing in his petition that (1) Arizona's sex offender registration statute cannot be applied retroactively, (2) the registration requirement violates his right of protection against double jeopardy, (3) the registration requirement violates A.R.S. § 1-246, (4) his "sentence of imprisonment violates the Eighth Amendment's prohibition of cruel and unusual punishment," and (5) there was insufficient factual basis for his plea and a related "possible claim for ineffective assistance of counsel."

The trial court summarily denied relief on Clark's petition, concluding that this court had "considered and rejected" his arguments related to the sex offender registration statute in *State v. Henry*, 224 Ariz. 164, 228 P.3d 900 (App. 2010), that Clark's sentence was not cruel and unusual punishment, and that "[t]he factual basis was more than sufficient to support [Clark]'s guilty plea."

State v. Clark, 2011 WL 1532368 (Ariz. App. Apr. 20, 2011); Ex. A (copy of decision).² The Arizona Court of Appeals affirmed the trial court's decision. *Id.* Clark then sought review of the decision by the Arizona Supreme Court, which initially granted review, but after oral argument vacated review as improvidently granted on May 8, 2012. Exs. B, C.

¹ The factual summary of the Arizona Court of Appeals is accorded a presumption of correctness. 28 U.S.C. § 2254(e)(1); *Moses v. Payne*, 555 F.3d 742, 746 n. 1 (9th Cir. 2009) (citing *Hernandez v. Small*, 282 F.3d 1132, 1135 n. 1 (9th Cir. 2002)).

² Unless otherwise indicated, all exhibit references are to the exhibits attached to the Respondents' Answer to Amended Petition for Writ of Habeas Corpus (Doc. 13).

Petitioner commenced this action with the filing of his original petition on March 5, 2013 (Doc. 1). He subsequently filed the now pending amended petition on May 16, 2013. (Doc. 8). Clark raises one claim in the amended petition. He claims that his conviction for failing to register as a sex offender, his sentence and the continuing requirement that he register as a sex offender violate the Ex Post Facto Clause of the United States Constitution. *Amended Petition*, pp. 5-6. Clark raised this claim in his Rule 32 petition for post-conviction relief. *Id.*, Ex. 2, pp. 4-5. He also raised the claims in his petitions for review to both the the Arizona Court of Appeals and the Arizona Supreme Court. *Id.*, Exs. 5, 6.

II. TIMELINESS

The Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides for a one year statute of limitations to file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Petitions filed beyond the one-year limitations period must be dismissed. *Id.* The statute provides in pertinent part that:

(1) A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

1 recognized by the Supreme Court and made retroactively applicable to
2 cases on collateral review; or

3 (D) the date on which the factual predicate of the claim or claims
4 presented could have been discovered through the exercise of due
5 diligence.

6 (2) The time during which a properly filed application for State post-
7 conviction or other collateral review with respect to the pertinent
8 judgment or claim is pending shall not be counted toward any period of
9 limitation under this subsection.

10 28 U.S.C. § 2244(d).

11 As noted above, the one-year AEDPA limitations period is tolled for the “time
12 during which a properly filed application for State post-conviction or other collateral
13 review with respect to the pertinent judgment or claim is pending.” *See* 28 U.S.C. §
14 2244(d)(2). Here, Clark’s properly filed PCR petition remained pending until May 8,
15 2012, when the Arizona Supreme Court vacated review as improvidently granted.
16 Ex. C. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007). Pursuant to 28 U.S.C. §
17 2244(d)(1), Clark then had one year to file his federal habeas corpus petition. By
18 filing the original petition on March 5, 2013, Clark satisfied the deadline and his
19 petition is timely.

20 **III. MERITS**

21 **A. AEDPA Standards**

22 Under the AEDPA, a federal court “shall not” grant habeas relief with respect
to “any claim that was adjudicated on the merits in State court proceedings” unless
the state decision was (1) contrary to, or an unreasonable application of, clearly
established federal law as determined by the United States Supreme Court; or (2)

1 based on an unreasonable determination of the facts in light of the evidence presented
2 in the State court proceeding. 28 U.S.C. § 2254(d). *See Williams v. Taylor*, 120
3 S.Ct. 1495 (2000). A state court's decision can be "contrary to" federal law either (1)
4 if it fails to apply the correct controlling authority, or (2) if it applies the controlling
5 authority to a case involving facts "materially indistinguishable" from those in a
6 controlling case, but nonetheless reaches a different result. *Van Tran v. Lindsey*, 212
7 F.3d 1143, 1150 (9th Cir. 2000). In determining whether a state court decision is
8 contrary to federal law, the court must examine the last reasoned decision of a state
9 court and the basis of the state court's judgment. *Packer v. Hill*, 277 F.3d 1092, 1101
10 (9th Cir. 2002). A state court's decision can be an unreasonable application of federal
11 law either (1) if it correctly identifies the governing legal principle but applies it to a
12 new set of facts in a way that is objectively unreasonable, or (2) if it extends or fails
13 to extend a clearly established legal principle to a new context in a way that is
14 objectively unreasonable. *Hernandez v. Small*, 282 F.3d 1132 (9th Cir. 2002).

15 **B. Ex Post Facto Clause**

16 As Clark explains it in his Memorandum in Support of Amended Petition
17 (Doc. 8-1), in 1982, when he was 18-years-old, he pled guilty to sexual misconduct, a
18 class 2 felony, arising from an incident of consensual sex with a minor under 15
19 years-old, and was sentenced to and successfully completed four years' probation.
20 At the time, Arizona did not have a sex offender registration statute. *See State v.*
21 *Henry*, 224 Ariz. 164, 168, 228 P.3d 900, 904 (App. 2010). However, a year later, on
22 July 27, 1983, Arizona enacted its modern sex offender registration statute, A.R.S. §

1 13-3821. *State v. Noble*, 171 Ariz. 171, 172-73, 829 P.2d 1221, 1218-19 (1992).
2 Under the statute, Clark was classified as a Level Three Offender, meaning that the
3 statute applied to him to the greatest extent possible. On December 21, 2009, Clark
4 was arrested for failing to register as required under the statute. On January 13,
5 2010, pled guilty to the charge, a class 4 felony, and on February 12, 2010, was
6 sentenced to a stipulated term of 3.5 years' imprisonment. Clark contends that by
7 requiring him to satisfy the registration requirements of A.R.S. § 13-3821, the State
8 of Arizona has violated the Ex Post Facto Clause of the United States Constitution,
9 article I, § 10, cl. 1.

10 In rejecting Clark's Ex Post Facto claim, the trial court and the Arizona Court
11 of Appeals relied on *State v. Henry*, 228 P.3d 900 (Ariz. App. 2010), which in turn
12 relied on the Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003). In
13 *Smith*, the Supreme Court reversed the Ninth Circuit's decision in *Doe v. Otte*, 259
14 F.3d 979 (9th Cir. 2001), and held that an Alaska statute requiring those convicted of
15 aggravated sex offenses to register every 90 days for life did not violate the Ex Post
16 Facto Clause. 538 U.S. at 99-105. Clark argues that *Smith* is not controlling in this
17 case because, unlike the petitioners in *Smith*, Clark was imprisoned, placed on
18 probation and is seeking to have his conviction overturned. Additionally, Clark
19 argues that the requirements of the Arizona statute render it much more punitive than
20 the Alaska statute addressed in *Smith*. Specifically, he contends that the Arizona
21 statute's community notification provisions and sex offender registry website subject
22 registrants, particularly in the internet age, to a humiliating display of personal

1 information and status as a sex offender. Clark's arguments fail for a number of
2 reasons.

3 Under AEDPA, the state court's denial of relief is unreasonable if it correctly
4 identifies the governing federal legal principle but applies it to a new set of facts in a
5 way that is objectively unreasonable, or if it extends or fails to extend a clearly
6 established legal principle to a new context in a way that is objectively unreasonable.
7 *Hernandez*, 282 F.3d 1132. Because it is the last reasoned decision addressing
8 Clark's ex post facto claim, the Court must examine the trial court's order denying
9 the claim. *Packer*, 277 F.3d at 1101 (habeas court must examine last reasoned
10 decision of a state court). Clark does not argue that the trial court unreasonably
11 extended or failed to extend a clearly established legal principle to a new context.
12 Rather, he argues that the state court correctly identified the governing legal principle
13 as set out by the Supreme Court in *Smith*, but then applied it to the facts of his case in
14 a way that is objectively unreasonable. The Court disagrees.

15 Unlike the petitioners in *Smith*, Clark was actually imprisoned and placed on
16 probation as a result of his violation of the Arizona registration requirements. He
17 contends that his conviction and imprisonment makes his case "substantively
18 distinguishable from *Smith*." *Petition*, p. 6. He does not, however, cite any
19 authority, much less Supreme Court authority, that seizes on this distinction in
20 support of a finding that sex offender registration laws can violate the Ex Post Facto
21 Clause. Even in the cases that involve petitioners who, like Clark, have been
22 prosecuted for violation of registration requirements, this factor does not impact the

1 court's analysis of the ex post facto implications of such statutes. For example, in
2 *United States v. Elkins*, 683 F.3d 1029 (9th Cir. 2012), the Ninth Circuit applied *Smith*
3 to a defendant's claim that requiring him to register pursuant to the federal Sex
4 Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.*,
5 violated the Ex Post Facto Clause. *Id.* at 1043-1049. Despite the fact that the
6 defendant was not merely prospectively challenging the application of SORNA, but
7 was being prosecuted for failing to register, the court's discussion never raises that
8 distinction in rejecting the defendant's ex post facto claim. *See id.* Nor would it
9 make any sense if they had—the purpose of challenging the registration laws is not
10 only to avoid the registrations obligations, but also the penalties associated with
11 violating them. This is true whether the petitioner in a particular case has violated
12 the provisions or not.

13 Clark next contends that Arizona registration requirements are decidedly more
14 burdensome than the Alaska statute examined in *Smith*. *Petition*, pp. 6-10. He first
15 notes that the extensive public access mandated through the community notifications
16 provisions, found in A.R.S. §§ 13-3285 and 3286, and the sex offender registry
17 website provision, found in A.R.S. § 3287, are not only a forced display of a scarlet
18 letter, but also “shine a spotlight on that letter.” *Petition*, p. 6. These requirements,
19 along with ever-increasing public access to the internet, create the potential for
20 harassment and intimidation despite the website's warning that the information
21 should not be used for such purposes. As Clark argues, internet access has
22 undoubtedly increased since the Supreme Court's decision in *Smith* in 2003.

1 However, he cites no authority that undermines the holding in *Smith* that the use of
2 the internet to disseminate truthful and otherwise publicly accessible information
3 does not constitute punishment. *See Smith*, 538 U.S. at 97-99. Moreover, the Ninth
4 Circuit has held that a state law which required government agencies to *actively*
5 notify the public of a sex offender's status was not so punitive as to violate the Ex
6 Post Facto Clause. *Russell v. Gregoire*, 124 F.3d 1079, 1082 (9th Cir. 1997). The
7 logic of that conclusion "remains sound in the wake of *Smith*," because even the

8 [a]ctive dissemination of an individual's sex offender status does not
9 alter the Court's core reasoning that "stigma . . . results not from public
10 display for ridicule and shaming but from the dissemination of accurate
11 information about a criminal record, most of which is already public."

12 *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1056 (9th Cir.
13 2012) (quoting *Smith*, 538 U.S. at 98). In light of *Smith* and its ensuing application
14 by the Ninth Circuit, this Court cannot conclude that the state court's rejection of
15 Clark's argument on this point was unreasonable.

16 Clark also contends that the Arizona statute's criminal penalties and \$250
17 assessment render the statute punitive for purposes of ex post facto analysis. The
18 former contention, that the criminal penalties constitute punishment, is dispelled by
19 *Smith*. Like the Arizona statute, the Alaska statute found constitutional in that case
20 imposed criminal penalties, including felony penalties for certain violations. *See*
21 *Smith*, 538 U.S. at 96; *see also* Alaska Stat. §§ 11.56.835 and 11.56.840 (describing
22 criminal penalties for violation of registration requirements).

1 As for the monetary assessment, the Court assumes Clark is referring to the
2 assessment imposed under A.R.S. § 13-3824 for failing to comply with the
3 registration requirements. In support of his contention that such an assessment is
4 punitive, Clark cites *Doe v. Raemisch*, 895 F.Supp.2d 897 (E.D. Wis. 2012). In that
5 case, the district court did conclude that the assessment at issue did violate the Ex
6 Post Facto Clause. *Id.* at 909. At the root of the decision, however, was the fact that
7 the assessment was annual and applied to offenders who had been discharged from
8 their sentences. *Id.* Thus, the Wisconsin assessment at issue in *Raemisch* is readily
9 distinguished from the one-time assessment imposed upon conviction under the
10 Arizona statute. Moreover, on appeal, the Seventh Circuit reversed the district
11 court's conclusion, finding that the annual registration fee was not punitive. *Mueller*
12 *v. Raemisch*, 740 F.3d 1128, 1133-34 (2014).

13 Clark next contends that lifetime in-person registration constitutes an
14 affirmative disability or restraint that renders the Arizona statute unconstitutional.
15 *Petition*, pp. 12-13. In *Smith*, the Court found that Alaska's registration
16 requirements, requiring lifetime registration for more serious offenders, imposed no
17 physical restraint therefore imposed only a negligible disability. 538 U.S. at 89, 101.
18 The Court explained that any negative impact on a registrant's employment or
19 housing prospects resulted not from the registration requirements, but from the fact
20 of conviction. *Id.* at 101. Consistent with the Supreme Court's holding, the Ninth
21 Circuit has concluded that registration statutes like Arizona's which require lifetime,
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1 in-person registration every 90 days did not impose any constitutionally significant
2 affirmative disability. *Masto*, 670 F.3d at 1056.

3 Clark's last substantial argument is that the Arizona statute is rendered
4 unconstitutional because it imposes lifetime registration obligations on all offenders
5 and offers no mechanism to seek relief. *Petition*, pp. 16-18. To the extent this claim
6 alleges a procedural due process violation, it is foreclosed. The Supreme Court has
7 concluded that, once an individual has been convicted of a sex offense, no further
8 process is required before imposing sex offender conditions. *Conn. Dep't of Pub.*
9 *Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (concluding that "the law's requirements turn
10 on an offender's conviction alone—a fact that a convicted offender has already had a
11 procedurally safeguarded opportunity to contest").

12 Also foreclosed is Clark's argument that the Arizona statute is excessive in
13 scope because it does not offer individualized review for those subject to its
14 requirements. In *Smith*, the Supreme Court held that Alaska could make "reasonable
15 categorical judgments that conviction of specified crimes should entail particular
16 regulatory consequences." 538 U.S. at 103. The Court explained that "[t]he State's
17 determination to legislate with respect to convicted sex offenders as a class, rather
18 than require individual determination of their dangerousness, does not make the
19 statute a punishment under the *Ex Post Facto* Clause." *Id.* at 104; *see also Masto*,
20 670 F.3d at 1057 (finding Nevada's registration requirements were not excessive and
21 did not violate the *Ex Post Facto* Clause).

1 Despite the Supreme Court authority weighing heavily against him, Clark
2 offers *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), to bolster his argument. In
3 *Wallace*, however, the Indiana Supreme Court expressly stated that it evaluating the
4 registration requirements under the Indiana Constitution’s Ex Post Facto Clause and
5 that the inquiry required “an independent analysis” *Id.* at 378. That
6 independent analysis led the court to conclude that the Indiana statute, at least as
7 applied to Wallace, “violates the prohibition on ex post facto laws contained in the
8 Indiana Constitution” *Id.* at 384. The analysis being based on the Indiana
9 Constitution, it does not impact upon the United States Supreme Court’s decision in
10 *Smith* and the Ninth Circuit’s subsequent application of *Smith*.

11 **III. RECOMMENDATION**

12 Based on the foregoing, the Magistrate Judge **RECOMMENDS** that the
13 District Court, after its independent review, **deny** Clark’s Amended Petition for Writ
14 of Habeas Corpus (Doc. 8).

15 This Recommendation is not an order that is immediately appealable to the
16 Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1),
17 Federal Rules of Appellate Procedure, should not be filed until entry of the District
18 Court’s judgment.

19 However, the parties shall have fourteen (14) days from the date of service of
20 a copy of this recommendation within which to file specific written objections with
21 the District Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the
22 Federal Rules of Civil Procedure. Thereafter, the parties have fourteen (14) days

1 within which to file a response to the objections. Replies shall not be filed without
2 first obtaining leave to do so from the District Court. If any objections are filed, this
3 action should be designated case number: **CV 13-0129-TUC-JAS**. Failure to timely
4 file objections to any factual or legal determination of the Magistrate Judge may be
5 considered a waiver of a party's right to *de novo* consideration of the issues. *See*
6 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003)(*en banc*).

7 Dated this 9th day of December, 2014.

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10 Jacqueline M. Rateau
United States Magistrate Judge
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